IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT DIVISION EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ALFONSO MARTINDALE,** Defendant and Appellant.	Case No. B213695

Los Angeles County Superior Court, Case No. LA056510
The Honorable Susan M. Speer, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, appellant was charged as follows: in counts 1 and 2 with malicious and false report of a bomb (Pen. Code, § 148.1, subd. (c))[1]; and in counts 3 and 4 with criminal threats (§ 422). Appellant pleaded not guilty. (1CT 31-35.)

The prosecution's motion to dismiss counts 1 and 3 was granted. Trial was by jury. Appellant was found guilty in counts 2 and 4 as charged. (1CT 48, 56, 96-97, 99.)

Imposition of sentence was suspended and appellant was granted probation on various terms and conditions, including a county jail sentence with credit for time served. Appellant was ordered to pay $200 in restitution, and a $200 probation revocation fine was imposed and suspended. (1CT 119-122.)

Appellant appeals from the judgment of conviction. (1CT 123.)

STATEMENT OF FACTS

A. Prosecution

On July 30, 2007, at approximately 3 p.m., appellant entered the Van Nuys offices of Valley Economic Development Center (VEDC), a non-profit organization that provided loans to businesses. (2RT 326-327, 359-360.)

While appellant was sitting in the reception area, Joan Liddell, the receptionist at VEDC, talked to a co-worker about a call where

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[1] All further statutory references will be to the Penal Code unless otherwise noted.

they informed a client that they had misplaced his business plan. (2RT 359-361, 373.) Appellant said, "Look at these motherfuckers. They dumb asses. They done lost somebody's business report." (2RT 373.)

A loan officer called appellant, and they went into a conference room to speak. (2RT 354, 373-374.) Appellant spoke with loan officer Andrea Deluna. (2RT 605-606.) Appellant wanted a "microloan," but he was not eligible because of his bad credit. (2RT 332, 606.) Appellant was unhappy, threatened to sue for discrimination, and said he would "have his day in court." (2RT 606.) Appellant wanted to speak to her supervisor, so Ms. Deluna went and got her. (2RT 609-610.)

Angela Stanislawski, the Director of Lending, went into the conference room and talked to appellant. (2RT 326-329, 374.) Because appellant had derogatory items on his credit report, Ms. Stanislawski talked about issues that he needed to get resolved in order to get a loan. (2RT 329-331.) Appellant interrupted Ms. Stanislawski when she tried to explain why they could not go forward on a loan, and he asked to speak to a supervisor. (2RT 331-332.) Appellant was upset and raised his voice. (2RT 332.) He felt VEDC was obligated to give him a loan, and he would not listen to what Ms. Stanislawski was saying. (2RT 332.)

Ms. Stanislawski went and explained the situation to her supervisor, Roberto Barragan. (2RT 332-333.) Ms. Stanislawski and Mr. Barragan returned to talk to appellant. (2RT 333.) Mr. Barragan looked at appellant's credit report, and told appellant the same thing that Ms. Deluna and Ms. Stanislawski had told appellant. (2RT 333.)

Appellant got more upset and raised his voice; he said that they were obligated to give him a loan because he paid taxes and worked for the federal government. (2RT 333-334.) Mr. Barragan asked appellant if he had any identification, and appellant said he did not have it with him. (2RT 333.) Mr. Barragan realized that appellant was not listening to them and that they needed to decline him for the loan. (2RT 333.)

Ms. Stanislawski went to her office and typed up a letter declining appellant for a loan with reasons why the loan was being declined. (2RT 334.) The reasons in the letter to appellant were: delinquent credit obligations, collections, charge offenses, foreclosures, insufficient collateral, and incomplete business plan. (2RT 335.) Mr. Barragan signed the letter and took it to give to appellant. (2RT 334, 356.)

The receptionist, Ms. Liddell, saw appellant leave the conference room. (2RT 359-362.) Appellant was yelling "at the top of his lungs." (2RT 362.) Appellant said things to Mr. Barragan about being Nazis, and said he was a government official and made more money than anybody in their company. (2RT 362.) Appellant was "very irate." (2RT 362.) Mr. Barragan was quiet and asked appellant to leave. (2RT 362.) Appellant continued to stand there calling Mr. Barragan a Nazi and a "motherfucker" and saying, "Fuck you." (2RT 362.) Ms. Liddell never heard Mr. Barragan use any racial slurs or call appellant anything derogatory. (2RT 362-363.)

Appellant headed toward the elevator and said that "when he finished with our building, it would be leveled." (2RT 363-364.) Appellant also said when he "finished," the parking lot would be

level. (2RT 364.) The building in which the VEDC offices were located had underground parking. (2RT 373; see 2RT 364.) As appellant went down in the elevator, Ms. Liddell continued to hear appellant to call them Nazis and say, "Fuck you." (2RT 365.)

Kerry Aubrey was in the elevator lobby at the parking level when she heard screaming coming from inside the elevator. (2RT 615-617.) The elevator doors opened, and appellant, the only occupant, came out. (2RT 616-617.) Appellant looked at some pictures of elected officials that were hanging on the wall; he "flipped them off" and screamed, "Nazis, fucking Nazis." (2RT 617, 620.) Appellant screamed, "By the time I'm done with this place, it's going to be a motherfucking parking lot." (2RT 617.) Ms. Aubrey believed appellant meant that he was going to blow up the building. (2RT 618.) Ms. Aubrey was afraid of appellant. (2RT 621.)

About two minutes after appellant left, Ms. Liddell received a phone call from appellant. (2RT 365.) He wanted to speak to Mr. Barragan and said, "Let me speak to that motherfucker. I want to speak to that Nazi motherfucker." (2RT 365.) Ms. Liddell would not let appellant speak to Mr. Barragan and hung up on appellant. (2RT 365.) Appellant called about ten times in a row. (2RT 365.)

In the phone calls, appellant said he was going to level the parking lot, and that he was going to blow up the building. (2RT 366-367, 378, 380.) Ms. Liddell was afraid of appellant's threats. (2RT 367, 372.)

Ms. Liddell, who was apparently African American as was appellant, told appellant that he was the reason that people look at "us" the wrong way. (2RT 368.) She said he was acting very

ignorant and needed to stop. (2RT 368.) Appellant said he had left some articles in the reception area and he asked Ms. Liddell for them. (2RT 368.) Ms. Liddell told appellant to call the Van Nuys police station because they had his things. (2RT 368.) Appellant asked, "Are you serious?," and Ms. Liddell said, "Yes." (2RT 368.)

Eventually, Ms. Liddell stopped answering the phone and let voicemail answer. (2RT 378.) Appellant left some voicemail messages. (2RT 348-350, 369.)[2] In one message, appellant said:

> Mister Reynaldo, Mister Reynaldo, you think this is a joke? . . . You the crook. . . . You fucking Nazi. . . . I'm untouchable motherfucker! Who the fuck do you think you talking to? You don't fucking call me no fucking nigger, and disrespect me like I'm fucking dirt. You fucking clown. I'll sue your ass out of this fucking country, before you fucking disrespect me like that and put me down anymore. I'm getting the fuck off SSI, and your ass is gonna be on the unemployment line, motherfuckers. You fucking asshole.

(1CT 58.)

Appellant left another voicemail stating:

> -- punk ass Nazi. I said motherfuck [inaudible] the devil. I make appointments for him, and you got yours motherfucker. So when you go see him, I'm gonna laugh at your stupid ass while you're looking stupid and

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[2] A CD and transcript of the voicemails were marked, and the CD was played for the jury. (Peo. Exhs. 3, 4; 2RT 348-350, 369-370; 1CT 58-59.) Both were admitted into evidence. (2RT 653.)

> burning, you stupid motherfucker. . . . Fuck you. Get the fuck out of my government you fucking asshole! Yeah, you ain't heard the last of me. . . . You fucking punk ass bitch! I ain't through with you, and I'll keep ringing your motherfucking phone off the hook, and you, and the fucking police, FBI, CIA ain't gonna do shit, motherfuckers! I'll come see your ass right back right now, motherfucker. You know who I am. Little bitch ass fucking wetback motherfucking Nazi motherfucker. You through.

(1CT 59.)

Ms. Liddell was upset by phone calls (2RT 337-339), and Ms. Stanislawski and Ms. Deluna were was afraid as a result of the messages (2RT 351, 607-608). They each called 911. (2RT 352, 370, 608.)[3] Ms. Liddell told the police that a customer had said he was "gonna blow up our company . . . " and "he was gonna blow us up." (1CT 61-62.)

B. Defense

Appellant testified in his own defense. (2RT 622.) Appellant was a motion picture screen writer, director, and producer, and he had been "practicing the art of entertainment" for over 20 years. (2RT 623.)

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[3] A CD and transcript of Ms. Liddell's 911 call were marked, and the CD was played for the jury. (Peo. Exhs. 5, 7; 2RT 370-371; 1CT 60-64.) Both were admitted into evidence. (2RT 653.)

Appellant had been instructed by SBA Pasadena that he was entitled to a microloan from VEDC. (2RT 623-624.) He needed the money for equipment, working capital, and cash flow. (2RT 624.)

Appellant went to the VEDC offices and met with a woman. She looked at his business plan and his corporate credentials, which included "Government Trust II level credentials," meaning he could contract with the government. (2RT 625, 628.) Ms. Stanislawski told appellant that he was not qualified for a loan based on his credit report. (2RT 625.) Appellant said he had already been told that he was entitled to a loan because SBA had certified his business as a disadvantaged business. (2RT 625.)

Appellant asked to speak to her superior. (2RT 625.) A second woman came in and she could not give him any "legitimate reason" why he could not qualify for a loan. (2RT 626.)

Appellant asked to see the president, and Mr. Barragan met with appellant. (2RT 626.) Mr. Barragan looked at appellant's credit report and said he would run another credit report and left the room. (2RT 626-627.) Mr. Barragan returned with a denial letter. (2RT 627.)

Mr. Barragan said appellant did not have a sufficient business plan, but appellant had a plan and Mr. Barragan did not look at it. (2RT 627.) Mr. Barragan also said appellant did not have collateral, but appellant had been told that no collateral was necessary for a loan of less than $5,000. (2RT 627.) Mr. Barragan told him he was not going to get a loan because he was not qualified and did not have the right credentials. (2RT 628.) Appellant said he had government level II trust credentials. (2RT 628.)

At that point, Mr. Barragan became a little agitated and told appellant he was not going to get a loan. (2RT 629.) Appellant asked him to look at his business plan and said that there were things on his credit report that were false. (2RT 629.) Appellant said he was entitled to a loan. (2RT 630.) Mr. Barragan said, "Your black ass isn't entitled to anything, and you just get your black ass out of my office. You are not getting anything because you are a criminal, and you just need to get out of here. Take your – take your ass out of here." (2RT 630.) Appellant was hurt by Mr. Barragan's profanity. (2RT 630.) Appellant became agitated and felt disrespected. (2RT 631.) Appellant told Mr. Barragan that he was discriminating and appellant said he was going to file a complaint with the Federal Trade Commission and other organizations. (2RT 631-632.)

Appellant was "really hurt," and he got angry, upset, and "a little loud." (2RT 632.) As appellant was at the elevator, Mr. Barragan called appellant a "nigger," and "flipped [him] off." (2RT 632, 643.) Appellant said, "You don't have no right to call me that." (2RT 632.) He said, "Someone should acquire this building because parking lots are a good investment." (2RT 633.) Mr. Barragan took the statement the wrong way. (2RT 633.) Appellant did not use profanity. (2RT 637.) Appellant also denied threatening to sue. (2RT 650.)

After he left, appellant called the VEDC offices several times. (2RT 634.) He was angry and frustrated. (2RT 634.)

Appellant did not intend to hurt or threaten anyone. (2RT 633.) He felt that everyone's anger can get out of control. (2RT 636.) He believed his "anger was provoked out of control." (2RT 636.) He

relapsed to a state where he "had no control . . . ." (2RT 640.) Appellant did not know whether he had used profanity on the voicemail messages and said he could not recognize his own voice on the recordings played in court. (2RT 637.) Appellant denied saying that he was going to blow up the building. (2RT 638.)

Appellant believed that the other witnesses who testified at trial said that they did not hear appellant threaten to blow up the building and that they understood that appellant had not made any bomb threat or threats to kill. (2RT 652-653.)

ARGUMENT

I. THERE WAS SUBSTANTIAL EVIDENCE SHOWING APPELLANT MADE A FALSE BOMB THREAT

After being denied a loan at VEDC, appellant screamed at Ms. Liddell, made repeated threats to the company, and threatened to blow up the building. Nevertheless, appellant contends the evidence is insufficient to support his conviction for malicious and false bomb report because: (1) his statements did not constitute a false bomb report; and (2) there was insufficient evidence he intended his statements as a false bomb report. (AOB 6-14.) But a jury could rationally conclude that appellant's statements were sufficient to constitute a false bomb report. Moreover, there is no requirement that appellant intended his statements as a bomb report. And, even if such an intent were required, there was more than sufficient evidence that appellant intended his statements as a bomb report.

A. In Reviewing for Sufficiency of the Evidence, Courts Review the Evidence in the Light Most Favorable to the Judgment

In reviewing a judgment for the sufficiency of the evidence, a court must review the evidence, in the light most favorable to the judgment, to see if there is substantial evidence from which any rational trier of fact could find each element of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Bloom*

(1989) 48 Cal.3d 1194, 1208; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) "The reviewing court presumes in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citations.]" (*People v. Bloom*, *supra*, at p. 1208; *People v. Carpenter* (1997) 15 Cal.4th 312, 386.) "If the circumstances reasonably justify the findings of the trier of fact as to each element of the offense, an opinion of the reviewing court that the circumstances might also lead to a contrary finding does not warrant reversal. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Beeler* (1995) 9 Cal.4th 953, 986; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1139.)

B. Appellant's Statements Constituted a False Bomb Report

Section 148.1, subdivision (c), makes it a crime for a person to "maliciously" inform another person "that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the information is false . . . ."

Here, appellant repeatedly said that he was going to "blow up" the VEDC building. (2RT 367, 378, 380.) He also made similar threats that were akin to saying that he would blow up the building: appellant said that "when he finished with our building, it would be leveled" (2RT 363-364); and appellant screamed, "By the time I'm done with this place, it's going to be a motherfucking parking lot" (2RT 617). Thus, appellant's statements were clear: he was stating that he intended to blow up the building. Since such statements were

made maliciously and knowing that they were false, they constituted a false bomb report under section 148.1, subdivision (c).

Appellant nevertheless contends that his statements were insufficient because they did not mention a bomb being "placed or secreted." (AOB 10.) But the jury could find implicit in appellant's statement, that he would blow up the building, an assertion that he would place a bomb in the building. Indeed, in order to "blow up" something, i.e., use a bomb to destroy something, one must "place" the bomb somewhere; otherwise nothing is going to "blow up."

Appellant also incorrectly suggests that the statute prohibiting bomb threats should not include this type of threat because it is meant to eliminate the costs that a false report can create as a result of unneeded evacuations. (See AOB 10-11.) The statute prohibits reports that a bomb "*will be* placed," meaning sometime in the future, as well as those reports about bombs that have been placed. Moreover, there is no requirement in the statute that bomb reports be actually believed. (See *Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1022-1023 [noting statute does not require that report of bomb "cause actual fear or harm"].) When false bomb reports are not believed or involve future threats, they are highly unlikely to involve evacuations and incur related costs. Thus, false bomb reports are not prohibited simply to reduce costs.

Also, subdivision (c) of section 148.1 is specifically aimed at prohibiting bomb reports that cause people to be afraid. It prohibits reports made "maliciously," that is with the "wish to vex, annoy, or injure another person . . . ." (§ 7, part 4.) Presumably then, that subdivision is to designed to prohibit bomb reports because they harm

people by causing them to be afraid. Given that appellant's threat to blow up the building caused Ms. Deluna, Ms. Stanislawski, Ms. Liddell, and Ms. Aubrey to be afraid (2RT 351, 367, 372, 607-608, 621), his statements are exactly the type that are meant to fall within the statute.

Finally, appellant notes that other cases involving a false report of a bomb under section 148.1, subdivision (a), involved specific statements involving the location of bombs. (See AOB 11-12.) Appellant cites to *Levin v. United Air Lines, Inc.*, *supra*, 158 Cal.App.4th at page 1012, involving a plaintiff who sued after being arrested for falsely stating that she had bomb in her luggage, and *People v. Cheaves* (2003) 113 Cal.App.4th 445, 449, involving a defendant who falsely claimed he had placed a bomb in the Los Angeles Times building. But both of those cases involved a report that a bomb "has been" placed, not that a bomb "will be" placed.

In any event, appellant made clear his target—the building where VEDC was located. As noted above, the jury could rationally infer that appellant's threats to blow up the building, to level the building, and to turn the building into a parking lot, meant that appellant was stating that a bomb would be "placed" on the premises. Accordingly, there was sufficient evidence to find that appellant's statements constituted a false bomb report.

C. There Was No Requirement That Appellant Intend His Statements As a False Bomb Report

Subdivision (a) of section 148.1 prohibits the same type of false bomb report as subdivision (c), except that the former must be made

to certain enumerated people and such reports need not be made maliciously. (*People v. Cheaves*, *supra*, 113 Cal.App.4th at p. 451.) In addressing subdivision (a), the Court of Appeal in *Levin v. United Air Lines, Inc.*, *supra*, 158 Cal.App.4th at page 1021, noted that a false bomb report is a general intent crime, not a specific intent crime. The statute does require knowledge that the statements regarding the bomb are false (*ibid.*), but the statements constitute a false bomb report even when made jokingly or sarcastically (*id.* at p. 1023). Thus, in stating, "the statute requires that the person intend to communicate that a bomb has been placed or secreted knowing that it has not been" (*id.* at p. 1021, fn. omitted), the court was simply stating that the defendant need only do the act that constitutes the crime intentionally, not that the defendant intend his statements as a false bomb report. (Cf. AOB 12.) Indeed, the court later clarified that the defendant's "intent in making the comments" is not an element of the crime. (*Levin v. United Air Lines, Inc.*, *supra*, at p. 1025.) Certainly, if the Legislature had desired a specific intent that the statements be taken as a bomb report, it could have included that requirement in the statute, as it has done for other crimes. (See § 422 [criminal threats prohibits the making of threat "with the specific intent that the statement . . . is to be taken as a threat"].)

The additional requirement that the report be made "maliciously" for subdivision (c) also does not require the defendant intend the statements as a false bomb report. As noted above, an act done "maliciously" is done with the desire to "vex, annoy, or injure another person . . . ." (§ 7, part 4.) A defendant who makes a false bomb report with the intent to annoy does not necessarily intend that

his or her statement be intended as a bomb report. Rather, a defendant could make an ambiguous assertion about a bomb with the intent to annoy or vex the recipient precisely as a result of the ambiguity. A jury could nevertheless find that the statement was sufficiently clear as to constitute a bomb report, even if the defendant did not intend it as a report, and the defendant should be held liable. Indeed, even if appellant in this case genuinely had not intended his statements about blowing up the building be understood as a bomb report, his statements still fell within the statute given that he made his statements intentionally, his statements could reasonably be interpreted as a bomb report, and he caused fear to numerous people.

In any event, there was sufficient evidence that appellant intended his statements as a bomb report. The jury was not required to find credible appellant's assertions that he did not make, and did not intend to make, any report of a bomb. Rather, the jury could reasonably conclude that appellant intended to make the people at VEDC believe that he was referring to a bomb when he threatened to blow up the building in order to cause fear.

Indeed, appellant's testimony was so implausible it bordered on the ridiculous. Even after listening to his own profanity-laced voicemail messages, appellant claimed he was offended by profane language, he did not use any such language, and he could not remember whether he has used any such language. (2RT 630, 637.) Ms. Liddell even heard appellant swearing *before* his loan application was rejected. (2RT 373 [while waiting in reception, appellant said, "Look at these motherfuckers" and "They dumb asses"].) Appellant's testimony that he was confronted by a racial slur and rude gesture just

prior to leaving was directly contradicted by Ms. Liddell. (2RT 362-363.) And his claim that he said the building could be turned into a parking lot as an investment, but that his statement was taken the wrong way, was simply absurd.

Rather, his voicemail messages made clear, in addition to the testimony of all the prosecution witnesses, that appellant was rude, vulgar, and threatening, and he was trying to intimidate and cause fear. Appellant's threats to blow up the building were viewed in the context of his other statements asserting that: he was not joking (1CT 58 ["you think this is a joke?"]), he was going to send the people at VEDC to hell (1CT 59 ["I make appointments for [the devil], and you got yours motherfucker"]), and he would return (1CT 59 ["you ain't heard the last of me. . . . I ain't through with you"]). As part of his tirade, not only did appellant "intend to communicate that a bomb has been placed or secreted knowing that it has not been," he intended to vex, annoy, and injure the people at VEDC.

Appellant claims that he did not intend his statements to be taken as a bomb report, noting that when Ms. Liddell told appellant he could pick up his things at the police station, appellant was surprised and asked, "Are you serious?" (AOB 13; see 2RT 368, 378-379.) But given the numerous threats and attempts to intimidate, appellant could easily have been shocked that the people at VEDC had had the audacity (in his mind) to report his conduct to the police when the consequences (blowing up the building) would be so devastating. In short, he was shocked that his intimidation and threats were not working as well as he had hoped; he was not shocked that his threats had been taken as threats.

Thus, viewing the evidence in the light most favorable to the verdict, the jury could rationally find appellant guilty of maliciously making a false bomb report. Therefore, appellant's claim of insufficient evidence should be rejected.

II. APPELLANT'S CLAIM IS PROCEDURALLY BARRED, THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN RESPONDING TO A JURY QUESTION AS AGREED TO BY APPELLANT, AND ANY ALLEGED ERROR WAS HARMLESS

When the jury asked a question during deliberations, the trial court gave a response that all counsel agreed to. Appellant nevertheless contends the trial court erred in responding to the jury. (AOB 14-22.) In the alternative, he contends counsel was ineffective in acquiescing to the trial court's response. (AOB 22-23.) Appellant's claim of trial court error is procedurally barred because his trial counsel agreed to the response given. In any event, the trial court's response was proper, and any error was harmless. Appellant's claim of ineffective assistance of counsel fails because he cannot show the lack of a reasonable tactical decision, or prejudice. Accordingly, appellant's claim fails.

A. Appellant's Trial Counsel Agreed with the Trial Court's Response to the Jury's Question

In instructing the jury, the trial court gave "CALCRIM A. MALICIOUS INFORMING OF FALSE BOMB," which instructed the jury on the elements of a malicious false bomb report in part as follows:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant willfully and maliciously informed a person, to wit: Joann Liddell;

2. That a bomb or other explosive device has been or will be placed or secreted in any public or private place;

3. That the defendant knew this information was false; . . . .

(1CT 90.)

During deliberations, the jury sent a question to the judge asking, "Question one, does blowup [*sic*] qualify as a bomb or explosive device? Two, do we have to agree on all items one, two and three on page one of one of CALCRIM A, malicious informing of false bomb?" (2RT 902; 1CT 68.) The trial court informed the parties of the jury's question, and proposed to give the following answer:

1. Yes, if you find the defendant maliciously and willfully conveyed any words or conduct to another person and that person reasonably believed that this was a threat to use a bomb or explosive device, then such words or conduct qualify as a bomb or explosive device to prove element number 2 of the crime alleged in count 2.

2. Yes, you must find each element of the crime beyond a reasonable doubt in order to convict the defendant.

(1CT 69; 2RT 902.)

The trial court said it wanted to know if counsel agreed with the proposed response. (2RT 902.) Appellant's trial counsel said, "Yes,

your Honor, I agree." (2RT 902.) So, the court gave the proposed response to the jury. (2RT 902.)

B. Appellant's Claim of Trial Court Error Is Procedurally Barred

The failure to object to a trial court's response to a jury question forfeits any claim of error, on appeal, regarding the response. (*People v. Benavides* (2005) 35 Cal.4th 69, 114; *People v. Martinez* (2003) 31 Cal.4th 673, 698.) Similarly, where counsel agrees to language in a response to a jury question, any error is barred as invited. (*People v. Mays* (2007) 148 Cal.App.4th 13, 37; see *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193 [where defendant has "both suggested and consented to the responses given by the court, the claim of error has been waived"].)

Here, appellant's trial counsel did not object to the trial court's response, and counsel agreed with the trial court's proposed response. Therefore, his claim of trial court error is forfeited by the failure to object and barred as invited error as a result of counsel's consent. Accordingly, appellant's claim of trial court error is procedurally barred.

C. The Trial Court Was within Its Discretion to Give the Instruction Proposed by Appellant's Trial Counsel

Under section 1138, a jury may request further information during deliberations. "Section 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law.

[Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 985.) The trial court has discretion in determining how to respond to such requests:

> The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.]

(*People v. Beardslee* (1991) 53 Cal.3d 68, 97; accord, *People v. Smithey*, *supra*, at p. 985.)

For instance, the trial court's response to a similar jury question was upheld in *People v. Yarbrough* (2008) 169 Cal.App.4th 303. There, the defendant was charged, in part, with possession of a loaded firearm in a public place. (*Id.* at p. 307.) The evidence showed that the defendant was seen in the "sidewalk area" and walking up a driveway to a home when he tossed a loaded gun. (*Id.* at pp. 307-308.) During deliberations, the jury asked, "To be found guilty of the second count: (1) must the defendant be on the sidewalk, or (2) is being on the driveway sufficient? (3) Define public place for us." (*Id.* at pp. 314-315.) The trial court responded, "(1) No. (2) Yes. (3) The area in front of a home, including a private driveway, is a public place if it is reasonably accessible to the public without a barrier." (*Id.* at p. 315.) The defendant claimed the trial court's response amounted to a directed verdict on the element of public place. The Court of Appeal

acknowledged that, absent a stipulation, it is error for a trial court to directly inform a jury that an element of a crime charged has been established. (*Ibid.*)

But the Court of Appeal found the trial court's response did not usurp the jury's function since the court did not instruct the jury that a driveway was a public place. (*People v. Yarbrough*, *supra*, 169 Cal.App.4th at pp. 315-316.) Rather, "the instruction left the jury with the task of making two essential factual determinations based upon the evidence as a prerequisite to a guilty verdict on count 2: first, that defendant was on the driveway; and second, that the driveway was reasonably accessible to the public." (*Id.* at p. 316.) Therefore, "[t]he instruction given by the trial court in response to the jury's inquiry did not remove any issue of fact from the jury or direct a verdict for the prosecution. [Citations.]" (*Ibid.*)

Here, as in *Yarbrough*, the trial court's response did not remove any issue from the jury's consideration. The trial court did not instruct the jury that a statement to "blow up" something was a false bomb report. Rather, the trial court's response left the jury with several factual determinations to make: (1) that appellant made the statement that he was going to "blow up" the building; (2) that appellant maliciously and willfully conveyed those words to another person; and (3) that person who heard appellant's statements reasonably believed that this was a threat to use a bomb or explosive device. Furthermore, the trial court made clear that the jury had to find this element, as well as all the other elements, "beyond a reasonable doubt in order to convict" appellant. (1CT 69; 2RT 902.)

Thus, the trial court's response did not remove the element of whether a bomb or explosive device had been or was going to be placed somewhere. The court's response simply clarified that if the person who heard appellant's statement to "blow up" the building reasonably believed that his statement was a threat to use a bomb or explosive device, then the second element of the offense had been satisfied. Since the trial court's response simply clarified the element, the trial court acted within its discretion to give the response agreed to by appellant. Therefore, no error occurred.

D. Any Alleged Error Was Harmless

A judgment shall not be set aside for "misdirection of the jury" unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) As explained in *People v. Watson* (1956) 46 Cal.2d 818, 836, under the miscarriage of justice standard, a defendant is not entitled to reversal unless, but for the complained of error, there is a reasonable probability the defendant would have received a better result. The *Watson* standard of harmless error generally applies to an erroneous response to a jury under section 1138. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1054-1055; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1015; see *People v. Beardslee*, *supra*, 53 Cal.3d at p. 97 [any violation of section 1138 does not warrant reversal unless prejudice has been shown].)

However, appellant's claim is that the trial court incorrectly removed an element of the offense from the jury's consideration. Such an error is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

(*Neder v. United States* (1999) 527 U.S. 1 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *People v. Flood* (1998) 18 Cal.4th 470, 504; see *People v. Sakarias* (2000) 22 Cal.4th 596, 623-626.) Under *Chapman*, an error does not require reversal where the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Here, even if the jury had been given a different response, it would still have found appellant guilty. Appellant suggests the jury should have been instructed that *they* had to determine whether appellant's statements constituted a bomb report, rather than determine whether Ms. Liddell reasonably understood the statement as a bomb report. (AOB 18.) In light of the actual response given by the trial court, the jury here found that Ms. Liddell *reasonably* concluded that appellant was making a bomb report. Since the jury would no doubt have considered themselves reasonable people, there is no likelihood they would have interpreted appellant's statements any differently than Ms. Liddell. That is, the jury would have concluded that appellant's statements constituted a false bomb report, especially since the evidence showing that very element was strong. (Argument I, B, *ante*.)

Indeed, in a separate count, the jury found appellant guilty of criminal threats, meaning appellant: (1) willfully threatened a crime resulting in great bodily injury or death; (2) with the specific intent that the threat be taken as a threat; (3) with a threat that was, on its face and under the circumstances, so unequivocal, unconditional, immediate and specific as to convey a gravity of purpose and immediate prospect of execution; (4) the threat actually caused the victim to be in sustained fear for her safety; and (5) the fear was

reasonable. (§ 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) The statements that constituted the false bomb report were the same ones that constituted the criminal threats. (See 2RT 671, 674 [prosecutor's closing argument identifying basis for counts].) Since the jury otherwise determined that appellant made the statements that he was going to blow up the building, and that those statements constituted a threat of great bodily injury or death, they surely would have determined that appellant's statements also constituted a statement that "a bomb or other explosive device has been or will be placed or secreted in any public or private place." Therefore, any error was harmless beyond a reasonable doubt.

E. Appellant Has Failed to Show Ineffective Assistance of Counsel

In the alternative, appellant contends his counsel was ineffective for failing to object to the trial court's response to the jury's question. (AOB 22-23.) But appellant fails to show either deficient performance or prejudice.

To establish ineffective assistance of counsel, a defendant has the burden to demonstrate that: (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms; and (2) the defendant was prejudiced by counsel's deficient representation, i.e., there is a reasonable probability that, but for counsel's failings, the defendant would have received a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Waidla* (2000) 22 Cal.4th 690, 718; *In re*

Ross (1995) 10 Cal.4th 184, 214 [burden is on the defendant to show ineffective assistance of counsel].)

A reviewing court should be highly deferential when reviewing counsel's performance. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 689.) "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Ibid.*) "A reviewing court will not second-guess trial counsel's reasonable tactical decisions. [Citation.]" (*People v. Milner* (1988) 45 Cal.3d 227, 238.) In order to show ineffective assistance of counsel on appeal, the record must affirmatively show a lack of rational tactical purpose for the alleged erroneous act or omission. (*People v. Williams* (1997) 16 Cal.4th 153, 215; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

"If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1008, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

Here, the record does not disclose whether counsel had a tactical basis for agreeing to the trial court's proposed response to the jury's question. Therefore, appellant's claim fails. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.)

Moreover, counsel could have had a reasonable tactical basis for not requesting a limiting instruction. Here, the trial court's

proposed response included additional requirements that are not required for making a false bomb report. As appellant notes, there is no requirement that the hearer believe the false bomb report. (AOB 18; *Levin v. United Air Lines, Inc.*, *supra*, 158 Cal.App.4th at p. 1025 [effect of comments on person who heard report is not an element of the crime].) Thus, the trial court's response, requiring the jury to find not only that a bomb report had been made but that the person who heard it *believed* it was a bomb report, and that the person *reasonably* believed it was a bomb report, added elements to the offense that are not required. Appellant's trial counsel may have felt that the addition of these requirements, in effect making the prosecution's burden more difficult, could work to his client's advantage. Counsel may have thought this was especially helpful since the trial court's response was given after closing arguments, and the prosecution had no opportunity to argue how these additional requirements had been shown. Therefore, counsel could reasonably agree to the trial court's proposed response.

In any event, appellant cannot show prejudice. As demonstrated above, any error was harmless. (Argument II, D, *ante*.) Thus, there is no reasonable probability that appellant would have been acquitted if counsel had objected to the court's response and a different response been given. Therefore, there was no prejudice, and appellant's claim should be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: November 30, 2009 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 6,961 words.

Dated: November 30, 2009

EDMUND G. BROWN JR.
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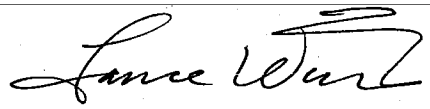

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